IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2009

STATE OF TENNESSEE v. SHAWN I. SKINNER

Direct Appeal from the Circuit Court for Rutherford County
No. F-59961 Don R. Ash, Judge

No. M2008-02195-CCA-R3-CD - Filed October 20, 2009

In May 2007, the defendant, Shawn I. Skinner, pled guilty to violating the Motor Vehicle Habitual Offender Act, a Class E felony. The trial court sentenced him to two years probation. The Rutherford County Circuit Court revoked his probation and reinstated his original sentence based on his excessive use of alcohol. On appeal, the defendant argues that the evidence contained in the record is insufficient to support the trial court's revocation of his probation. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Guy R. Dotson, Jr., Murfreesboro, Tennessee, for the appellant, Shawn I. Skinner.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Trevor H. Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

The record reflects that on May 15, 2007, the defendant, Shawn I. Skinner, pled guilty to violating the Motor Vehicle Habitual Offender Act. The trial court sentenced him to two years in the Tennessee Department of Correction and ordered him to serve his sentence on probation. On November 20, 2007, the trial court violated the defendant's probation and extended it for two years after he received assault, vandalism, aggravated criminal trespass, and criminal impersonation charges. The police arrested the defendant on April 20, 2008 for domestic assault, vandalism, public intoxication, reckless endangerment, and criminal trespass. The trial court issued a second probation violation warrant on April 30, 2008 and held a revocation hearing on August 22, 2008.

At the hearing, Alex Eskew, a probation officer for the State of Tennessee, testified that he was the officer assigned to the defendant's case. Mr. Eskew began supervising the defendant on August 21, 2007. He stated that after the defendant pled guilty to a violation of the Motor Vehicle Habitual Offender Act, the court ordered him to serve two years on probation, after service of sixty days in jail, and to pay a $250 fine. Mr. Eskew said that the defendant had another violation of probation warrant issued against him because the police arrested him on September 2, 2007. As a result of this arrest, the court violated the defendant's probation and extended it for two years. The court also ordered him to serve thirty-six days in jail with thirty-six days credit. Mr. Eskew stated that the defendant signed an agreement stating that he would serve his sentence for any future violations. He further stated that he did not know the disposition of the charges underlying the probation violation.

Mr. Eskew filed a probation warrant charging the defendant with "not immediately reporting his arrest to his probation officer, using alcohol to excess, and . . . assaultive behavior that posted [sic] a threat to himself and others." Mr. Eskew said that he requested that the court issue a violation of probation warrant for the defendant because the police arrested him for domestic assault, vandalism, public intoxication, reckless endangerment, and criminal trespassing. According to Mr. Eskew, "all of the rules are explained when someone first gets placed on probation. [The defendant] signed and dated the probation order . . . [indicating] he understood all of the rules and allegations." Mr. Eskew stated that the defendant advised him of his arrest four days after the police arrested him.

On cross-examination, Mr. Eskew testified that he was unaware of any other probation officers that were supervising the defendant. He said that he usually acquired a booking sheet from the jail to determine when offenders are released on bond, but he did not in this case. Mr. Eskew did not discover that the defendant was released on bond until he checked the booking sheet the morning of the defendant's appointment. He stated that the defendant reported to him the Wednesday following his arrest at his regularly scheduled time. The defendant reported his arrest to Mr. Eskew when he arrived for his appointment.

Mr. Eskew testified that the defendant was employed, but "there was a period when he was unemployed" during his probation. He said that the defendant reported as scheduled for his appointments and passed all his drug screens, except on March 24, 2008, when "[t]he field test [revealed] that he was positive for marijuana." However, Mr. Eskew sent the field test to the lab and "[t]he lab report came back negative for all drugs." Mr. Eskew stated that the defendant was making payments toward his fine and court costs.

On redirect examination, Mr. Eskew testified that he had "24-hour a day voice mail" and the defendant "absolutely" did not leave a message saying that he picked up new charges and had been released from jail. According to Mr. Eskew, the defendant notified him of the new charges by indicating his arrest on his monthly report form. He also told Mr. Eskew about the charges. Mr. Eskew stated that he was familiar with the post sentence reports that are prepared after a defendant pleads guilty and one was prepared and filed with the court in this case.

Officer Tory James Moore, a patrolman with the Shelbyville Police Department, testified that he came in contact with defendant on April 20, 2008, after learning he was involved in a domestic situation. Officer Moore stated that he, "identified the [defendant] . . . at the Super 8." Officer Moore then "[r]eturned back and continued taking the statements from the other subject involved[,] [m]ade contact again with [the defendant] in the sally port of corrections, [and] [t]ook him in the Commissioner's office." He further stated that while in the Commissioner's office, the defendant made "several remarks regarding law enforcement amidst profanity." According to Officer Moore, the defendant "made it very clear that he wasn't worried about [the] charges . . . [and] that he would be getting out of them." Officer Moore stated that the defendant had "a very strong odor of alcohol or alcoholic beverage on or about his person. He did have blood shot glassy eyes and slurred speech. He was unstable on his feet."

Lieutenant Mike Baker, of the Shelbyville Police Department, testified that on April 20, 2008, he received a description of a domestic violence suspect. He stated that he was patrolling DelRay Street and saw "a group of people outside of the Super 8 Motel . . . [and] the [d]efendant crossing the parking lot, actually walking up to the crowd of people." He said that the defendant matched the description he had received. After he saw the defendant, Lieutenant Baker "went into the parking lot. . . . [a]nd when [he] got there, [he] noticed the suspect[.]" Lieutenant Baker said the suspect "kind of looked [his] way a few times" and then "darted around a corner of the hotel there." Lieutenant Baker said he spoke to the group of women in the parking lot and one of them told him that "the guy went into her room." According to Lieutenant Baker, the woman said she did not know the man and gave Lieutenant Baker permission to enter her room to apprehend him. He stated that he entered the room, found the defendant hiding in the bathroom, and took him into custody. Lieutenant Baker recalled that the defendant was "sweating quite a bit" and "had a real strong odor of alcohol on him." He said that the defendant "didn't say much" to him, but he "noticed his eyes were blurred . . . [and] red." Lieutenant Baker stated that the defendant was "obviously intoxicated." On cross-examination, Lieutenant Baker stated that he did not take the defendant for a blood test or a breathalyzer test.

After hearing the evidence, the trial court found by a preponderance of evidence that "there was proof that [the defendant] had consumed alcohol in excess, which [was] a violation of [his] probation."[1] Based on the defendant's failure to comply with past conditions of probation, the judge found that he was "an appropriate person to just serve [his] sentence" and revoked his probation.

Analysis

On appeal, the defendant contends that the trial court erred in revoking his probation and reinstating his original sentence. He argues that the trial court should not have revoked his probation because the drinking alcohol in excess provision was ambiguous and the state did not present sufficient evidence to show that he violated his probation.

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[1] There were various allegations on the violation warrant. However, at the hearing, the trial judge did not rule on them, nor were they included in the violation of probation order.

Following a defendant's arrest for a violation of probation, the trial judge must inquire as to the charges and determine if a violation has occurred. Tenn. Code Ann. § 40-35-311(b). The essential question facing the trial court in a probation revocation proceeding is whether the court's determination "will subserve the ends of justice and the best interest of both the public and the defendant". *See Hooper v. State*, 201 Tenn. 156, 297 S.W.2d 78, 81 (1956). The decision to revoke probation lies in the sound discretion of the trial court. *State v. Leach*, 914 S.W.2d 104, 106 (Tenn. Crim. App. 1995) When making the decision, "proof of a probation violation need not be established beyond a reasonable doubt, but it is sufficient if it allows the trial court to make a conscientious and intelligent judgment." *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). The trial court may revoke probation upon finding by a preponderance of the evidence that the defendant has violated the conditions of his or her probation. *See* Tenn. Code Ann. §§ 40-35-310, 311; *Harkins*, 811 S.W.2d at 82.

The judgment of the trial court to revoke probation will be upheld on appeal unless there has been an abuse of discretion. *Harkins,* 811 S.W.2d at 82. If the trial court has exercised "conscientious judgment in making the decision rather than acting arbitrarily," then there is no abuse of discretion. *Leach,* 914 S.W.2d at 106 (citations omitted). Discretion is abused only if the record contains no substantial evidence to support the trial court's conclusion that a violation has occurred. *Harkins*, 811 S.W.2d at 82; *State v. Gregory*, 946 S.W.2d 829, 832 (Tenn. Crim. App. 1997).

In the instant case, the defendant argues that the probation condition requiring him to refrain from using intoxicants of any kind in excess is ambiguous and he urges this court to apply the definition used in *Life & Casualty Insurance Co. v. Robertson,* defining using excessive alcohol use as "habitual and customary use." *Life & Cas. Ins. Co. v. Robertson,* 6 Tenn. App. 43, (Tenn. Ct. App., 1927). He contends that under this definition, the state's evidence of his public intoxication on one occasion is not substantial evidence of habitual and customary use of alcohol, and thus he did not consume alcohol in excess. The state responds by arguing that the definition in *Life & Cas. Ins. Co.* was for the purpose of screening out unsuitable risks by insurance company and is inapplicable in the present case.

This court has affirmed a trial court's finding that a defendant has violated the use of alcohol in excess condition based on a single occurrence. *See State v. James Earl Knight,* No. 01-C-01-9112-CR00362, 1992 WL 105951, at *1 (Tenn. Crim. App., at Nashville, May 20, 1992) (concluding that the state demonstrated that the defendant drank alcohol in excess and the trial judge exercised a conscientious judgment in ordering the revocation of the defendant's probation after he was arrested for driving under the influence and pled guilty to public intoxication); *State v. Richard Lee Frazier*, No. E2005-00776-CCA-R3-CD, 2005 WL 3568397, at *3 (Tenn. Crim. App., at Knoxville, December 29, 2005) (concluding that the trial court did not abuse its discretion by revoking the defendant's probation and ordering him to serve his sentence in incarceration after he was charged with driving under the influence, violation of the implied consent law, speeding, third offense driving on a revoked license, no insurance, and violation of the registration law)*; State v. Brenda Nabors*, No. 111, 1990 WL 192003, at *2 (Tenn. Crim. App., at Jackson, December 5, 1990)

(holding that there clearly was substantial evidence to support the trial judge's finding that the defendant had violated her probation by excessive use of alcohol after she was arrested and charged with DWI, reckless driving, public drunkenness, failure to yield, failure to take the breathalyzer test, and driving without a license). Accordingly, we conclude that evidence of the defendant's use of alcohol on one occasion is sufficient to support the trial court's finding that he violated his probation by using alcohol in excess.

The defendant also argues that there was nominal proof of the defendant's use of alcohol in excess presented to the court. We disagree. At the revocation hearing, the state presented proof that the defendant was arrested for multiple charges, including public intoxication. The testimony of the two officers, which the trial court obviously accredited, established that the defendant was perceivably intoxicated when he was arrested. There was substantial evidence to support the trial court's finding that the defendant violated his probation by drinking alcohol in excess.

We conclude that the trial court did not abuse its discretion in revoking the defendant's probation. The record from the revocation hearing demonstrates that the defendant violated the conditions of his probation. It is undisputed that while on probation, the defendant was arrested for domestic assault, vandalism, public intoxication, reckless endangerment, and criminal trespassing. As such, the trial court acted within its discretion to revoke the defendant's probation.

Conclusion

Based upon the foregoing reasoning and authorities, we affirm the judgment of the trial court revoking the defendant's probation.

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J.C. McLIN, JUDGE